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MICHAEL RODAK, JR.

No. 73-700

In the Supreme Court of the United States

OCTOBER TERM, 1973

DOMINIC BIONDO AND WILLIE FRANCISCO ORLANDO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted of having conspired to extort money, in violation of the Hobbs Act, 18 U.S.C. 1951.[1] They were sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A) and denied a petition for rehearing on September 27, 1973 (Pet. App.

[1] Petitioners were acquitted on a second count, charging extortion in violation of the Hobbs Act. Co-defendant Accardi, who was also indicted on both counts, was granted a severance prior to petitioners' trial, and his indictment was subsequently dismissed.

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D). The petition for a writ of certiorari was filed on October 29, 1973, and is out of time under Rule 22(2) of the Rules of this Court. In any event, the petition presents no question warranting review by this Court.

The facts in this case are detailed in the opinion below (Pet. App. A 3–5). Briefly, the evidence at trial revealed that one Joseph Wozniak and Anthony Michael Accardi, an alleged co-conspirator, entered into a business arrangement whereby they purchased and operated three fruit and produce markets in the St. Louis area: Tony's Colonial Market No. 1; Colonial Fruit Market No. 2; and the Woodson Market. Colonial Market No. 1 was purchased by Accardi in September 1970 with $20,000 loaned to him by Wozniak without any written agreement or contract (Tr. 30–31). The Woodson Market was purchased by Wozniak in November 1970 for $2,000 in order to expand Wozniak's and Accardi's fruit and vegetable business (Tr. 44–46). Colonial Market No. 2 was purchased in December 1970 by Wozniak, Accardi and one Giardano with $6,000 supplied by Wozniak (Tr. 47, 302).[2] These three markets were operated by Wozniak and Accardi as one business with three branches (Tr. 44–48, 58). Petitioners (Biondo and Orlando) and alleged co-conspirator Joseph Scalise were employees at Colonial Market No. 1 (Tr. 62–64, 224–225).

On May 18, 1971, Wozniak met with Orlando and Scalise and was told by Orlando that Biondo wanted $15,000 in cash from Wozniak and that unless he

[2] Both Wozniak and Accardi were listed as buyers on the Colonial Market No. 2 purchase contract (Gov't Exhibit 2).

agreed to Biondo's demand, Biondo would hurt Wozniak's "wife and kid" and would run up $100,000 in bills at Colonial Market No. 2, for which Wozniak would be held responsible (Tr. 67–73). On May 19 and 20, Biondo telephoned Wozniak and threatened to run up $100,000 in bills and to harm Wozniak's family, unless the money was delivered immediately (Tr. 78, 91, 95, 150–152). Meanwhile, Orlando, whom Wozniak considered a friend and advisor, was urging Wozniak to pay Biondo the $15,000 and was assuring Wozniak that once that sum had been paid, Biondo, whom Orlando described as "a raving maniac" (Tr. 74), would not demand additional money (Tr. 74, 93, 221, 223).

Following the initial demand of $15,000 on May 18, Wozniak had reported the entire matter to the Federal Bureau of Investigation (Tr. 449–450). With Wozniak's permission, F.B.I. agents monitored two telephone calls from Orlando to Wozniak on May 21. In these conversations, Wozniak stated that he could raise only $5,000 that day, and Orlando, after contacting Biondo, told Wozniak to bring the $5,000 to a designated parking lot at 3:30 p.m. and to get the rest of the money by the following Monday (Tr. 102–103, 531–540).

Wozniak met with petitioners, as scheduled, and handed Biondo a marked envelope containing $5,000 in recorded bills (Tr. 418–420). Biondo told Wozniak he was "going to save money by paying this" and instructed Wozniak to give the balance of $10,000 to Orlando in a week (Tr. 115–116). Petitioners were

arrested at the parking lot immediately thereafter (Tr. 116, 421–424, 436–437, 456–458).

Petitioners contend (1) that the evidence was insufficient to show that they conspired to obtain money in violation of the Hobbs Act; (2) that there was a fatal variance between the indictment and the proof at trial; (3) that their rights under the Jencks Act (18 U.S.C. 3500) were violated; (4) that a statement by Orlando was obtained in violation of *Miranda;* (5) that severance of co-defendant Accardi deprived them of their Fifth Amendment due process rights; and (6) that the court improperly denied their motion for a mistrial based on a comment by the prosecutor during closing argument. These contentions were thoroughly considered and properly rejected in the opinion below (Pet. App. A 5–15), upon which we principally rely. We add only the following comments.

1. With regard to the sufficiency of the evidence to establish a conspiracy to violate the Hobbs Act, petitioners do not contend that the jury could not properly have found a conspiracy to affect the movement of fruit and produce by extortion of property from Wozniak, using fear generated by threats to the health and well-being of his family and the economic well-being of Colonial Market No. 2. Rather, they contend only that the evidence was not sufficient to show, as alleged in the indictment, (1) that movement of fruit and produce in interstate commerce would be so affected, and (2) that Wozniak was an "owner" of Colonial Market No. 2. However, the evidence showing interstate movement of products significant to the over-

all business of a fruit and produce market permitted a reasonable inference that the statutory requirement that the extortionate conspiracy affect interstate commerce was satisfied. The determinations of both courts below that a jury question was sufficiently raised by the evidence presents no legal issue requiring further review by this Court.

Similarly, the evidence of Wozniak's financial interest in Colonial Market No. 2, his relationships with Accardi in the closely related transactions concerning the other two markets, and the threats of petitioners (who had familiarity with the operations of the markets) linking Wozniak with the well-being of Colonial Market No. 2, were sufficient to permit the jury to conclude that Wozniak had some ownership interest in that market, as he did in the other two. In any event, in view of the evident fact that petitioners had reason to believe that a threat against the economic well-being of Colonial Market No. 2 would be likely to induce Wozniak to meet their extortionate demands, the precise nature of his interest in that market is not material.

2. As to petitioners' claim of a fatal variance between the indictment and the proof, the fact that all three markets were operated as a single business made evidence as to the other two directly relevant to a consideration of the issues pertaining to Colonial Market No. 2 under the indictment. The case thus does not present the situation where the business and interstate commerce alleged in the indictment to have been affected by the extortion were essentially different

from those shown by the proof, as in *Stirone* v. *United States,* 361 U.S. 212. The court of appeals' decision properly applied the principles of *Stirone* and does not warrant further review by this Court.

3. There is no record support for petitioners' contention in regard to the severance of co-defendant Accardi (Pet. 40, n. 8) that the government's motive in indicting Accardi was to prevent him from testifying. On the contrary, a portion of Accardi's grand jury testimony, which defense counsel presented to the court on *voir dire,* reveals that Accardi's testimony would have been helpful to the government in establishing Wozniak's ownership of the Colonial Markets, since, in his grand jury testimony, Accardi referred to Wozniak as "my partner" (Tr. 203).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

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[3] Petitioners state that, when defense counsel suggested that the government's motive in indicting Accardi was improper, the prosecutor made no denial (Pet. 40, n. 8). A reading of the transcript (Tr. 204–205) reveals, however, that the prosecutor's reply to defense counsel's accusation was interrupted by the court, thus precluding the prosecutor from answering the accusation in detail. Any further consideration of this issue on appeal would be inappropriate in view of the absence of any evidence on the matter of motive. Petitioners' remedy, if any, would be by motion under 28 U.S.C. 2255.

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